

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 08-00113-01/02-CR-W-NKL
)	
TODD BARKAU,)	
)	
and)	
)	
DEBRA PALMER,)	
)	
Defendants.)	

GOVERNMENT'S RESPONSE TO DEFENDANTS'
JOINT MOTION TO COMPEL PRODUCTION

COMES NOW the United States of America, by John F. Wood, United States Attorney, and Cynthia L. Cordes, Assistant United States Attorney, for the Western District of Missouri, and responds to the Defendant's Motion to Compel Production of computer evidence in this case.

The United States does not oppose this motion from Defendants Barkau and Palmer, but simply requests that counsel for the defendants specify which files and folders that do not contain child pornography that they want reproduced. The computer media files in this case are abundant and inextricably intertwined with child pornography. The defendants' discovery request is governed by 18 U.S.C. § 3509(m), a provision of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, 629 (July 27, 2006). The Adam Walsh Act amended Federal Rule of Criminal Procedure 16 with respect to the disclosure of child pornography materials. The Adam Walsh Act provides that material that constitutes child

pornography shall “remain in the care, custody, and control of either the Government or the court.” 18 U.S.C. § 3509(m)(1). “Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography, so long as the Government makes the property or material reasonably available to the defendant.” 18 U.S.C. § 3509(m)(2)(A). The statute provides that property or material “shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material” by the defendant, his or her attorney, and any defense experts. 18 U.S.C. § 3509(m)(2)(B).

The United States has provided full and complete open file discovery in this case. This discovery has included providing the defendants with full access to the raw images of all of the computer media at the Heart of American Regional Computer Forensics Laboratory (RCFL) and to the detailed government computer forensic expert reports. Defense counsel, at any time, with or without their own experts, can review any file or folder on the raw computer media or any file and folder extracted in the government expert reports at the United States Attorney’s Office or the Heart of American Regional Computer Forensics Laboratory. The discovery will continue to be available in this manner. It would be unduly burdensome to request that the government locate, review and access every file or folder on the computer media to determine if it may contain an image of child pornography for the convenience of defense counsel. The request made by defense counsel is unprecedented and would require exorbitant work by the

RCFL, the FBI, and the United States Attorney's Office. Every file would have to be reviewed, assessed, and a factual determination would have to be made if, in the case of an image file, the person depicted was under the age of 18 years. In many cases, such a factual determination would be impossible. The government would then have to extract the files one by one and generate a copy. At any time, however, if defense counsel requests a copy of specific files or folders that do not contain child pornography, the government is more than willing to provide a reproduction of those files or folders.

WHEREFORE, the government respectfully requests that some effort be made by defense counsel to specify which files and folders that do not contain child pornography they would like reproduced on their behalf and the government will comply with the said specified request. The government respectfully requests that the court otherwise deny this unprecedented demand that would place undue burden on government counsel, the RCFL, and the Cyber Crimes Task Force.

Respectfully submitted,

John F. Wood
United States Attorney

By */s/Cynthia L. Cordes*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on this 22nd day of December 2008, to the Electronic Filing System (CM/ECF) of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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